In the Supreme Court of the United States

NO. 76-384

VERNON SIMON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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CONSTITUTIONAL PROVISIONS

CITATIONS

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The petitioner, Vernon Simon, prays that a Writ of Certiorari issue to review the judgment entered on August 19, 1976, by the United States Court of Appeals for the Fifth Circuit in the proceeding entitled United States of America, Appellee vs. Vernon Simon, Defendant-Appellant, Docket No. 76-1738.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1976. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

1. Whether a defendant who has presented the defense of entrapment is deprived of a fair trial as guaranteed by the Fifth and Sixth Amendment when the government is permitted to introduce hearsay testimony of other crimes to sustain its burden of proving the defendant's predisposition to commit the crimes charged.

STATEMENT OF THE CASE

The petitioner, Vernon Simon, was convicted in the United States District Court for the Southern District of Florida in a nonjury trial of possession with intent to distribute and distribution of heroin in violation of 21 U.S.C., Section 841(a)(1). The petitioner appealed that judgment of conviction in the United States Circuit Court of Appeals for the Fifth Circuit wherein that conviction was affirmed.

The government's case in chief consisted of the testimony of Policewoman Barbara Sims of the Miami Police Department, Clarence Lydes, a paid informant for the

government, Officers Kenneth Lyles and Officer Stephen L. Kiraly of the City of Miami Police Department.

Policewoman Sims testified that on August 29, 1975, accompanied by the informant Clarence Lydes, she appeared in the defendant's residence, wherein he delivered to her a quantity of heroin for which she paid him $1,400.

The informant testified to substantially the same facts.

In his defense the defendant Vernon Simon testified that earlier in the day, on the 29th of August, 1975, the informant, a long time acquaintance, approached the defendant in a children's nursery that he and his wife operate. The informant sought to induce him to engage in a hoax with him, whereby it would be made to appear that Simon would deliver a quantity of heroin to him in front of his "girl friend", for which the informant would then pay him. The informant at that time displayed the heroin to the defendant. The informant's reason for this scheme was that his lady friend was a "good" prostitute who was working for him, and in the course of their association the prostitute had given him money with which to buy drugs which the informant had squandered. This hoax was meant to deceive the prostitute into believing that this was a genuine drug transaction, thereby keeping him in her good graces.

The defendant refused to go along with the scheme. Nevertheless, later that day the informant appeared unexpectedly at the defendant's residence with his lady friend (actually Policewoman Sims) and proceeded to

carry out his intended hoax. The defendant at that time became a reluctant participant. Other defense witnesses testified in corroboration of Simon's testimony.

To carry its burden of proving predisposition on the part of the defendant beyond a reasonable doubt to engage in drug traffic, the government introduced testimony of officer Kiraly that two days prior to August 29, 1975, one Les Brookins not otherwise identified, produced a quantity of heroin which Brookins stated he obtained from "Vernon". Officer Lyles testified that he saw Brookins enter the defendant Vernon Simon's residence but he could not say whether he had obtained the drug there, nor even if Simons was in his residence when Brookins entered and left. Brookins did not testify. No further testimony was offered as to this alleged crime. No arrest was made of the defendant.

REASONS FOR GRANTING THE WRIT

1. This petition presents a significant question concerning the competence of hearsay evidence of another crime, to establish the government's burden of proving the predisposition of the defendant to commit the crime charged beyond a reasonable doubt.

It has been established in the leading case on entrapment, *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932), that a defendant "cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." Accordingly the courts have permitted the introduction of "other crime" evidence, which would under

other circumstances be clearly inadmissible absent the defendant taking the stand in his own behalf.

Nevertheless, the courts have also recognized that such evidence must be controlled in a reasonable manner. In a case where the evidence was too remote or not probative, the appellate court found error. *United States v. Sherman*, 200 F.2d 880 (2nd Cir. 1952).

In the case of *Washington v. United States*, 275 F.2d 687, 690 (5 Cir. 1960), the appellate court admitted hearsay on both the question of predisposition and on the reasonableness of the officer's conduct.

On the other hand in *Whiting v. United States*, 296 F.2d 512 (1st Cir. 1961) and *United States v. Catanzaro*, 407 F.2d 998 (5th Cir. 1969) the Courts held hearsay inadmissible on the issue of predisposition, while considering it admissible on the issue of "reasonable grounds" or "probable cause" for the officer's approach.

In the cases of *Hansford v. United States*, 303 F.2d 219 (D.C. Circuit 1962) and *United States v. Johnston*, 426 F.2d 426 (7th Cir. 1970) the appellate court rejected hearsay on the issue of predisposition; the former on the grounds of lack of corroboration on the hearsay, the latter on the grounds that the hearsay statement of a dead informant offered by the officer was prejudicial error.

In the case, sub judice, there was no arrest for the alleged prior offense of the defendant. Certainly, there was no substantial corroboration of the hearsay testimony and no valid reason given for the nonproduction of the alleged informant Brookins, if indeed, he exists, since

not one iota of corroborative testimony as to the existence of Brookins, or his identity was offered by the government.

Defendant was thus exposed to damning testimony by a City of Miami Police Officer, who testified only to what "someone told him." Under these circumstances, it is respectfully submitted that the decision below runs contrary to the ideal of fundamental fairness in criminal prosecutions under the due process clause of the Fifth Amendment and the right of the accused to be confronted with the witnesses against him under the Sixth Amendment.

2. The lack of guidance from the Supreme Court in the issue presented herein, has resulted in a patchwork quilt of decisions in the various Federal Appellate Courts which are subjectively resolved.

The competitiveness and overzealousness of those charged with drug laws enforcement indicates more and more a need for a stricter, rather than a relaxed application of the evidentiary rules.

In the present state of the law, an accused who interposes a defense of entrapment, literally must accept the devastating effect upon the truth process of a waiver of his Sixth Amendment right of confrontation and cross-examination.

That is precisely the issue presented in the case sub judice.

CONCLUSION

For the reasons stated above, the petition for the writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-1738

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VERNON SIMON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(August 19, 1976)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

PER CURIAM:

Appellant, represented by counsel, was convicted in a non-jury trial of possession with intent to distribute, and distribution of heroin in violation of 21 U.S.C. § 841(a)(1). We affirm.

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*Rule 18, 5th Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

His defense was entrapment. To rebut this defense, the government presented the hearsay testimony of undercover agent Kiraly to establish appellant's prior disposition to deal in heroin. This testimony involved a transaction that occurred only two days before that for which appellant was on trial. Kiraly's testimony was substantially corroborated by that of another officer, Lyles. In these circumstances the district court did not err in admitting hearsay testimony to show a previous disposition on appellant's part in order to rebut his entrapment defense. See United States v. Simon, 488 F.2d 133 (5th Cir. 1973); United States v. Brooks, 477 F.2d 453 (5th Cir. 1973); Rocha v. United States, 401 F.2d 529 (5th Cir. 1968), cert. denied, 393 U.S. 1003 (1969).

AFFIRMED.

No. 76-384

In the Supreme Court of the United States

OCTOBER TERM, 1976

VERNON SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1976. The petition for a writ of certiorari was filed on September 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court committed reversible error in admitting hearsay testimony during the rebuttal of petitioner's claim of entrapment.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing heroin with intent to distribute it (Count I), and of distributing it (Count II), in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment on Count I and three years' imprisonment on Count II, the sentences to be served concurrently, and to five years' special parole. The court of appeals affirmed (Pet. App.).

On August 29, 1975, Barbara Sims, a Miami, Florida, police officer, and Clarence Lydes, an informant, went to petitioner's business establishment (a Miami day-care center) to purchase heroin (Tr. 13, 164). Petitioner inquired what kind of heroin they wanted and told them to meet him later at his house (Tr. 18, 165). At his house petitioner showed them a quantity of heroin and offered to sell it to them for $1,600 (Tr. 21-22, 171). Petitioner stated that the heroin was of good quality and could be ground up in a blender and diluted (Tr. 23-24). Sims told petitioner that she and Lydes had only $1,500, and ultimately petitioner sold the heroin to them for $1,400 (Tr. 21-23, 171-172).

Petitioner testified in his defense, stating that he had been entrapped by informant Lydes. On the day of the sale, according to petitioner, Lydes visited the day-care center alone and asked petitioner to pretend to sell to him heroin that Lydes already possessed (Tr. 60). Petitioner testified that Lydes told him that he had squandered money given him by his girlfriend to purchase heroin (*ibid.*): apparently the proposed fake sale to Lydes of heroin that he already possessed was to take place in the girlfriend's presence and somehow conceal from her Lyde's alleged misuse of her money.

In any event, petitioner testified that he refused to go along with the "hoax," but that Lydes—accompanied by his girlfriend (Officer Sims)—came to his house later the same day and again sought petitioner's help (Tr. 66). At this point, according to petitioner, he acquiesced and became a reluctant participant. Lydes surreptitiously passed him the heroin, then "purchased" it for $1,400, and then surreptitiously repocketed the money (Tr. 68-72). Throughout the transaction, petitioner testified, Lydes repeatedly kicked petitioner on the foot as if to encourage petitioner's participation in the "hoax" (Tr. 68, 69, 70). Petitioner also testified that Lydes inquired whether the heroin could be diluted, whereupon petitioner "got a blender" and "found some lactose" and diluted the heroin (Tr. 69). Finally, petitioner testified that he had previously been involved in possessing and selling the narcotics with Lydes, but that he stopped dealing with Lydes because he was not making a profit (Tr. 73-74).

Lydes testified on rebuttal that on the day of the sale he and Officer Sims went to the day-care center together and that in Sims' presence he told petitioner that they wanted to purchase heroin (Tr. 164-165). Lydes also testified that on petitioner's instruction he and Sims went to petitioner's house (Tr. 165, 168), where petitioner sold them the heroin (Tr. 170-173).

Another rebuttal witness, undercover Officer Kirlay, testified that only two days before the sale in question he had sought to buy heroin from Lonnie Brookins, who said that he would have to go to petitioner's house to obtain it (Tr. 135). Officer Kirlay further testified that Brookins, after making several trips to petitioner's house, sold him 25 bags of heroin (Tr. 135-138). Officer Kenneth Lyles testified that he observed Brookins make several trips to petitioner's house (Tr. 148) and confirmed that Officer Kirlay thereafter purchased heroin from Brookins (Tr. 150).

ARGUMENT

Petitioner contends that his conviction should be reversed because Officer Kirlay's testimony contained a hearsay statement by Brookins.

This Court long ago established that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells* v. *United States*, 287 U.S. 435, 451. See also *United States* v. *Russell*, 411 U.S. 423, 429. In the Fifth Circuit, that inquiry may include hearsay evidence that would be inadmissible for other purposes. *E.g.*, *United States* v. *Dickens*, 524 F. 2d 441 (C.A. 5), certiorari denied *sub nom. Glenos* v. *United States*, 425 U.S. 994. Other courts of appeals, as petitioner correctly notes (Pet. 5), have ruled that otherwise inadmissible hearsay evidence does not become admissible because introduced to show predisposition.[1] This case, however, does not afford a suitable occasion to resolve the conflict among the circuits to which petitioner alludes.

In the first place, as is clear from the rather comprehensive survey of the question in *United States* v. *McClain*, 531 F. 2d 431, 435-438 (C.A. 9), certiorari denied October 4, 1976, No. 75-6389, the conflict centers upon a kind of hearsay evidence—statements by extra-judicial declarants about the general reputation of the defendant say complained of by petitioner. The prosecution's rebuttal of petitioner's entrapment defense included only one piece of hearsay—Officer Kirlay's testimony that

[1]In addition to the cases cited by petitioner (except for *Hansford* v. *United States*, 303 F. 2d 219 (C.A. D.C.), which did not involve hearsay), see *United States* v. *McClain*, 531 F. 2d 431 (C.A. 9), certiorari denied October 4, 1976, No. 75-6389 (holding the admission of hearsay evidence harmless error).

for drug dealing--that is quite
different from the hear-

Brookins had stated that he would have to go to petitioner's house to get heroin. This was not hearsay regarding petitioner's general reputation, but rather an expression of Brookins' future intention or plan (amply corroborated by the non-hearsay evidence that Brookins did go to petitioner's house and did thereafter sell heroin to Officer Kirlay). As such, it was admissible as an exception to the hearsay proscription (see Fed. R. Evid. 803(3)), whether used to rebut the claim of entrapment or for any other purpose.

Moreover, even if the testimony regarding Brookins' statement were inadmissible, any error was plainly harmless in the circumstances of this case. Brookins' statement that he was going to petitioner's house to get heroin was merely cumulative of the non-hearsay evidence that Brookins sold heroin to Officer Kirlay only after—and immediately after—he in fact went to petitioner's house. Furthermore, petitioner's own testimony that he had previously engaged in heroin transactions with Lydes, and that he had lactose in his house with which to dilute the heroin, was sufficent evidence to support the court's finding of predisposition beyond a reasonable doubt, wholly apart from the hearsay statement of Brookins that he was going to petitioner's house to get heroin.

Finally, this was a trial to the court, not a jury—a relevant consideration to a determination of prejudicial error. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959. That court found Officer Sims' testimony highly credible—"that she was telling the truth"—and that the government had proved beyond a reasonable doubt that petitioner was not entrapped (Tr. 241, 242). Further review is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1977.

DOJ-1977-01